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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1263.

DANIEL K. STEWART, PLAINTIFF IN ERROR,

vs.

THE STATE OF VIRGINIA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED FEBRUARY 6, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 In the Circuit Court of the United States for the Eastern District of Virginia.

DANIEL K. STEWART
vs.
COMMONWEALTH OF VIRGINIA. } No. 1513.

RICHMOND, VA., *January 21st*, 1886.

Be it remembered that heretofore, to wit, on the 19th day of December, 1885, came D. K. Stewart and filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia the record in the above-entitled cause from the county court of the county of Henrico, which record is in the words and figures following, to wit:

Record.

STATE OF VIRGINIA,
County of Henrico, } *To wit:*

Pleas at the court-house of the county of Henrico, before the county court of the said county, on the 18th day of December, 1885.

Be it remembered that heretofore, to wit, at a county court held for the said county, at the court-house, on the 14th day of December, 1885, came D. K. Stewart and filed his petition in this court, alleging

2 that certain tax-receivable coupons therein described, and amounting to the sum of three thousand eight hundred and seven dollars, had been tendered by him to T. F. Taylor, deputy treasurer of said county, in payment of certain taxes due the Commonwealth by said petitioner, which said coupons were received by said officer and have been delivered by him, securely sealed up, to the judge of this court, and that the said petitioner had paid the said sum of three thousand eight hundred and seven dollars in money to the said officer in payment of said taxes.

Whereupon it is ordered that the attorney for the Commonwealth for this county, upon being previously served with a copy of this order, appear before this court on to-morrow morning at 11 o'clock to answer said petition.

(The following are true copies of the petition and Exhibit "B," filed therewith, and order of court summoning attorney for the Commonwealth to answer same, with return of officer thereon:)

To the Hon. E. C. Minor, judge of the county court for Henrico county:

3 Your petitioner, D. K. Stewart, respectfully represents unto your honor that he is a tax-payer of the said county; that on the 30th day of November, 1885, being indebted to the State of Virginia $3,809.87, State tax, he tendered T. F. Taylor, d'y treasurer of the said county and the officer appointed by law to receive said tax, in payment of so much thereof, $3,807 in past-due coupons (as per schedule herewith), cut from bonds of the said Commonwealth issued under an act of the General Assembly, approved 30th March,

1871, and entitled "An act to provide for the funding and payment of the public debt," which said coupons are by law receivable for all taxes, debts, and demands due the State of Virginia, who received the same for the purpose of identification and verification, and forwarded them to this court for that purpose according to law (see his receipt therefor herewith filed, marked Exhibit "B," and prayed to be taken as a part of this petition), and thereupon your petitioner paid him the full amount of his said tax in money.

Your petitioner alleges that the said coupons are genuine, legal coupons, and are legally receivable for all taxes, debts, and demands due the Commonwealth of Virginia, and he prays that a jury be empaneled to try the question whether they are genuine, legal coupons, legally receivable for all taxes, debts, and demands due the Commonwealth of Virginia, and he prays that the State of Virginia be
4 summoned to answer this petition, and that when the said coupons are ascertained to be genuine, legal coupons, legally receivable for all taxes, debts, and demands due the Commonwealth of Virginia, that this court will so certify, to the end that he may receive back the money so paid by him as aforesaid, according to law.

And he will ever pray, &c.

D. K. STEWART,
By Counsel.

(EXHIBIT B.")

COUNTY TREASURER'S OFFICE, HENRICO COUNTY,
RICHMOND, VA., *Nov. 30th*, 1885.

Received of D. K. Stewart, tax-receivable coupons of the State of Virginia, in payment of State taxes for 1885, to be handed the judge of the county court for identification and verification. The money for this tax is paid as required by the statute.

5			$30. No.—				$15. No.—	$3. [No.]
13002	13796	8211	1963	8704	5920	10335	44	4975
8944	13799	8402	1966	10660	294	11158	638	4976
13748	11965	8426	1977	12932	6383	9698	282	4977
10472	17868	8085	4714	6384	294	17820	336	5000
10653	16905	8084	3859	8706	294	16408	282	
11054	4642	1974	10842	4649	7844	14903	333	
10619	8891	1973	16668	15143	7844	12202	44	
10646	8893	2416	12505	12562	7844	12943	332	
13129	8892	2407	15862	1651	7843	14409	335	
13130	16905	2409	12127	3395	7843	8943	44	
13844	11964	2408	2726	1646	7843	16305	44	
13845	17868	1977	11557	6823	291	431	334	
14505	12562	3351	8534	17868	291	3957	337	
15892	15852	1967	431	11736	291	16038		
17566	12505	1964	10842	6385	2986	14903		
14797	16668	1971	16049	10657	6662	5390		
14900	12127	1965	7985	5851	9133	6695		
						16379		

120 × 30 =	3,600
13 × 15	195
4 × 3	12
	$3,807

Total $3,807.00

T. F TAYLOR,
D'y Treasurer.

(Copy order and return.)

6 In the County Court of the County of Henrico.

DECEMBER 14TH, 1885.

This day came D. K. Stewart and filed his petition in this court, alleging that certain tax-receivable coupons therein described, and amounting to the sum of three thousand eight hundred and seven dollars, had been tendered by him to T. F. Taylor, deputy treasurer of said county, in payment of certain taxes due the Commonwealth by said petitioner, which said coupons were received by said officer, and have been delivered by him, securely sealed up, to the judge of this court, and that the said petitioner had paid the said sum of three thousand eight hundred and seven dollars in money to the said officer in payment of said taxes.

Whereupon it is ordered that the attorney for the Commonwealth for this county, upon being previously served with a copy of this order, appear before this court on to-morrow morning at 11 o'clock to answer said petition.

A copy.
Teste: SAMUEL P. WADDILL, *Clk.*

7 (Endorsed:) Executed by delivering a true copy to the within-named G. W. Thomas, Commonwealth att'y for Henrico county, Va., on the 15th day of Dec'r, 1885. J. P. Neurohr, D. S. H. C.

And at another day, to wit, at a county court held for the county of Henrico, at the court-house, on the 15th day of December, 1885, came again the petitioner by his attorney, and the summons awarded on the said petition being returned executed upon the attorney for the Commonwealth, it is ordered that this proceeding be docketed.

And now at this day, to wit, at a county court held for the county of Henrico at the court-house on the day and year first herein written, to wit, on Friday, the 18th day of December, 1885, came again the petitioner, by his attorney, and by leave of court filed his petition, praying that this cause be removed to the United States circuit court for the eastern district of Virginia, and thereupon said petitioner tendered bond with security approved by the court,
8 as required by law; whereupon the court, as required by law, but without passing on the question as to the right of removal, as prayed for in the said petition, doth order that this cause be removed as prayed for to the United States circuit court for the eastern district of Virginia, and the court doth direct the clerk of this court to certify to the said United States court under the seal of this court

a copy of the record in this cause, and also transmit therewith, certified under said seal, the coupons received by the judge of this court from the treasurer of the county of Henrico in this cause.

The following is a copy of the petition for removal, together with a copy of the bond, &c., tendered to the court:

Petition.

In the County Court of the County of Henrico.

D. K. STEWART
vs.
THE COMMONWEALTH OF VIRGINIA.

To the Hon. E. C. Minor, judge of the county court of Henrico county:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled cause
9 exceeds, exclusive of costs, the sum or value of five hundred dollars.

And your petitioner states that the said suit is one arising under the Constitution of the United States in this, to wit, that it is a proceeding under the act of Assembly of the State of Virginia, approved January 14th, 1882, entitled "An act to prevent frauds upon the Commonwealth and the holders of her securities in the collection and disbursement of revenues," as amended by an act of Assembly of the said State approved March 12th, 1884, entitled "An act to amend and re-enact section 1 of an act approved January 14th, 1882," &c., the said acts providing for the identification and verification of certain coupons issued by the State of Virginia which she contracted to receive in payment of all taxes, debts, and demands due her.

That by an act of the General Assembly of the State of Virginia approved March 15th, 1884, entitled "An act to provide for the assessment of taxes on persons, property, and income," &c. (see 113, &c.), the collectors of taxes due to said State are forbidden to receive said coupons in payment of a certain proportion of said taxes; that this last-mentioned act is repugnant to section 10, article 1, of the Constitution of the United States, and is therefore null and
10 void; that it is necessary in the trial of the before-mentioned suit for the court trying the same to pass upon the validity and constitutionality of the said last-mentioned act for the reason that your petitioner, previous to the commencement of said suit, had tendered said coupons in payment of all their taxes, including that part thereof which said act forbids to be paid in said coupons, and the purpose of said suit is to recover that part of said taxes as well as the other part thereof; that this cause could not have been tried before the present term of this court, and that the same has not yet been tried.

Your petitioner offers herewith a bond, with good and sufficient security, for his entering in the circuit court of the United States for the eastern district of Virginia, on or before the first day of its next

session, a copy of the record in this suit, and for his paying all costs that may be awarded against him by the said circuit court if the said court shall hold that this suit was wrongfully or improperly removed thereto; and he prays that this honorable court proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record
11 herein to be removed unto the said circuit court of the United States for the eastern district of Virginia, and to certify the coupons received by the court in this case to the said circuit court.

And he will ever pray, &c.

D. K. STEWART,
By Counsel.

A. B. GUIGON, *P. Q.*

Bond.

Know all men by these presents that we, D. K. Stewart and Joseph Bryan, are held and firmly bound unto the Commonwealth of Virginia in the penal sum of ($500) five hundred dollars, for the payment whereof, well and truly to be made unto the said Commonwealth of Virginia, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet upon these conditions: that the said D. K. Stewart having petitioned the county court for Henrico county for the removal of a certain case therein pending, wherein the said D. K. Stewart is plaintiff and the said State of Virginia is defendant, to the circuit court of the United States in and for the eastern district of Virginia:

12 Now, if the said D. K. Stewart shall enter in the said circuit court of the United States, on or before the first day of its next session, a copy of the record of said suit, and shall well and truly pay all costs that may be awarded by the said circuit court if the said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be null and void; otherwise to remain in full force and virtue.

Witness our hands and seals this 17th day of December, 1885.

DAN. K. STEWART. [SEAL.]
JOS. BRYAN. [SEAL.]

Witness as to Jos. Bryan—
THOS. N. PAGE.

STATE OF VIRGINIA, *County of Henrico,* } *To wit:*

I, Samuel P. Waddill, clerk of the county court of the said county of Henrico, in the State of Virginia, do hereby certify that the foregoing and annexed is a true transcript of the record in the case of "D. K. Stewart against The Commonwealth of Virginia," lately depending in the said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the court-house, this 18th day of
13 December, 1885, and in the 110th year of the Commonwealth.

[Seal of Henrico County Court.]

SAMUEL P. WADDILL, *Clerk.*

STATE OF VIRGINIA, *County of Henrico,* } *To wit:*

I, Edmund C. Minor, only judge of the county court of the county of Henrico, in the State of Virginia, do certify that Samuel P. Waddill, whose genuine signature is subscribed to the foregoing certificate was, at the time of signing and attesting the same, the clerk of the said court, and that his said attestation is in due form.

Given under my hand and seal this eighteenth day of December, 1885.

E. C. MINOR, *Judge.* [SEAL.]

DANIEL K. STEWART *vs.* THE COMMONWEALTH OF VIRGINIA.

And now, at this day, to wit, at a circuit court of the United States in and for the eastern district of Virginia, held at Richmond, in said district, on the 21st day of January, 1886,
14 this cause came on this day to be heard upon a motion made by the defendant to remand the same to the county court of Henrico. Upon consideration whereof the court is of opinion that the act of Congress of March 3d, 1875, does not allow the petitioner to remove this cause to this court; therefore it is ordered that this cause be remanded to the county court of Henrico.

HUGH L. BOND,
Circuit Judge.

The following assignment of error was filed in this cause:

Assignment of Error.

DANIEL K. STEWART *vs.* THE COMMONWEALTH OF VIRGINIA.

The plaintiff in error assigns for error the action of the court in remanding his suit to the Henrico county court.

WM. L. ROYALL,
A. B. GUIGON,
Att'ys for Plaintiff in Error.

15 UNITED STATES OF AMERICA, *To wit:*

The President of the United States to the judges of the circuit court of the United States for the eastern district of Virginia, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said court before you, between Dan'l K. Stewart, plaintiff, and the State of Virginia, defendant, a manifest error hath happened, to the great damage of the said Dan'l K. Stewart, as by complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., on the 24th day of February, 1886, in

the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 25th day of January, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Allowed by—

RO. HUGHES, *Judge.*

16 United States of America, to wit, to the State of Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington city, in the District of Columbia, on the 24th day of February, 1886, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein Dan'l K. Stewart is plaintiff and the State of Virginia is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 25th day of January, in the year of our Lord one thousand eight hundred and eighty-six.

RO. W. HUGHES, *Judge.*

[Seal United States Circuit Court, Eastern District of Virginia.]

17 UNITED STATES OF AMERICA, *Eastern District of Virginia,* } *To wit:*

A. B. Guigon, being duly sworn on oath, deposeth and saith that on the 25th day of January, A. D. 1886, he duly served on R. A. Ayres, attorney general for the State of Virginia, and on the 27th day of January, 1886, he duly served on Fitzhugh Lee, Governor of said State, the within writ (or citation) by reading the same to and leaving a true copy thereof with each of them.

Sworn and subscribed to before me this 27th day of January, A. D. 1886.

THOMAS N. CARTER, *N. P.*

18 Circuit Court of the United States of America for the Eastern District of Virginia.

DANIEL K. STEWART *vs.* THE STATE OF VIRGINIA.

Know all men by these presents that we, Wm. L. Royall and A. B. Guigon, are held and firmly bound unto the State of Virginia

in the sum of five hundred dollars, to be paid to the said State of Virginia, — heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 25th day of January A. D. 1886.

Whereas the above-named Daniel K. Stewart hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the eastern district of Virginia:

Now, therefore, the condition of this obligation is such that if the above-named Daniel K. Stewart shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WM. L. ROYALL. [SEAL.]
A. B. GUIGON. [SEAL.]

Approved.

RO. W. HUGHES, *Judge.*

A copy.

Teste: M. F. PLEASANTS, *Clerk.*

19 UNITED STATES OF AMERICA, }
Eastern District of Virginia, } *ss:*

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, hereby certify that the foregoing is a true and complete copy of the record and proceedings in the cause mentioned in the caption hereof as the same remains on the files of my office.

In testimony whereof I have hereunto set my hand and the seal of said court, at Richmond, in said district, this 28th day of January, 1886.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS, *Clerk.*

Endorsed on cover: E. Virginia C. C. U. S. No. 1263. Daniel K. Stewart, plaintiff in error, *vs.* the State of Virginia. Filed February 6, 1886.

117-612

IN THE

Supreme Court of the United States.

D. K. STEWART v. THE STATE OF VIRGINIA.

No. 1263.

Motion to advance under the 32d rule.

I respectfully move the Court to advance this case under the 32d rule. The record is printed.

The plaintiff in error commenced a suit in the County Court of Henrico, Virginia, for the purpose of identifying and verifying some $3,800 of the State's tax-receivable coupons, under the provisions of the Act of January 14th, 1882, upheld by this court in *Antoni* v. *Greenhow*, 107 U. S. R.

At the first term at which it could be tried, he filed his petition praying for a removal of the cause to the U. S. Circuit Court, upon the ground that the constitutionality of an act of the Virginia Legislature must be passed on in the trial of the case, and, therefore, that it arose under the Constitution of the United States.

The act to be passed on is this: In March, 1884, the Virginia Legislature passed an act providing that that part of the public revenue which is appropriated to the public schools shall be paid in money, and not in coupons. The plaintiff in error claimed the

right to pay all of his taxes with the coupons—both that appropriated to the public schools and that not appropriated, and he maintained that the court trying the question of the genuineness of the coupons must say whether he could pay the school money with coupons, and, therefore, whether that act was valid. More than $500 being involved, he claimed the right to remove the cause to the U. S. Circuit Court. Upon consideration of it, the latter court held and was "of opinion that the Act of March 3d, 1875, does not allow the petitioners to remove this cause to this court; therefore it is ordered that this cause be remanded to the County Court of Henrico." (Record, p. 6.) From this order the plaintiff appealed.

The case comes exactly within the class of cases which the 32d rule provides shall be advanced and heard under the rules applicable to motions to dismiss.

WM. L. ROYALL.
For Plaintiff in Error.

Office Supreme Court U. S.
FILED.
APR 3 1886
JAMES H. McKENNEY.
CLERK.

117-612

IN THE

Supreme Court of the United States.

D. K. STEWART,
vs.
THE STATE OF VIRGINIA. } No. 1268.

ADVANCED UNDER RULE 32.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

The plaintiff in error owed the State of Virginia $3,807 for taxes for the year 1885. He tendered the State's tax-receivable coupons in payment thereof for identification and verification under the provisions of the act of January 14th, 1882, and at the same time he paid his tax in money.* He thereupon filed his petition in the

* The act is as follows:

CHAP. 7. *An Act to Prevent Frauds upon the Commonwealth and the Holders of Her Securities in the Collection and Disbursement of Revenues.*

[Approved January 14th, 1882.]

Whereas, bonds purporting to be the bonds of this Commonwealth issued by authority of the act of March thirtieth, eighteen hundred and seventy-one, entitled an act to provide for the funding and payment of the public debt, and under the act of March twenty-eighth, eighteen hundred and seventy-nine, entitled an act to provide a plan of settlement of the

County Court of Henrico county, praying that a jury might be empaneled to try whether his coupons were genuine coupons, legally receivable for taxes.

The Commonwealth having been summoned to answer this peti-

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public debt, are in existence without authority of law; and, whereas, other such bonds are in existence which are spurious, stolen, or forged, which bonds bear coupons in the similitude of genuine coupons, receivable for all taxes, debts, and demands due the Commonwealth; and, whereas, the coupons from such spurious, stolen, or forged bonds are received in payment of taxes, debts, and demands; and, whereas, genuine coupons from genuine bonds, after having been received in payment of taxes, debts, and demands, are fraudulently reissued and received more than once in such payments; and, whereas, such frauds on the rights of the holders of the aforesaid bonds impairs the contract made by the Commonwealth with them, that the coupons thereon should be received in payment of all taxes, debts, and demands due the said Commonwealth, and at the same time defrauds her out of her revenues; therefore, for the purpose of protecting the rights of said bondholders and of enforcing the said contract between them and the Commonwealth, and of preventing frauds in the revenue of the same:

1. Be it enacted by the General Assembly of Virginia, That whenever any tax-payer, or his agent, shall tender to any person whose duty it is to collect or receive taxes, debts, or demands due the Commonwealth, any papers or instruments in print, writing, or engraving, purporting to be coupons detached from bonds of the Commonwealth, issued under the act of eighteen hundred and seventy-one, entitled an act to fund the public debt, in payment of any such taxes, debts, and demands, the person to whom such papers are tendered shall receive the same, giving the party tendering a receipt stating that he has received the same for the purpose of identification and verification.

2. He shall at the same time require such tax-payer to pay his taxes in coin, legal tender notes, or national bank bills; and upon payment, give him a receipt for the same. In case of refusal to pay, the taxes due shall be collected as all other delinquent taxes are collected.

3. He shall mark each paper as coupons so received, with the initials of the tax payer from whom received and the date of receipt, and shall deliver the same, securely sealed up, to the judge of the county court of the county, or hustings court of the city, in which such taxes, debts, or demands are payable. The tax payer shall thereupon be at liberty to file his petition in said county court against the Commonwealth. A summons to answer which petition shall be served on the Commonwealth's attorney, who shall appeal to and defend the same. The petition shall allege that he has tendered certain coupons in payment of his taxes, debts, and demands, and pray that a jury be impaneled to try the question as to whether they are genuine, legal coupons, which are legally receivable for taxes, debts, and demands. Upon this petition an issue shall be made in behalf of the Commonwealth, which shall be tried by a jury, and either party shall have a right to exceptions on the trial, and of appeal to the Circuit Court and Court of Appeals. If it be finally decided in favor of the petitioner that the coupons tendered by him are genuine, legal coupons, receivable for taxes, and so forth, then the judgment of the court shall be certified to the Treasurer, who, upon receipt thereof, shall receive said coupons for taxes, and shall refund the money before then paid for his taxes by the tax-payer out of the first money in the treasury, in preference to all other claims.

4. Whenever any tax-payer shall apply to any court in this Commonwealth for a *man-*

tion, at the first term at which the cause could be tried, he filed his petition praying for a removal of the case to the Circuit Court of the United States as a case arising under the Constitution of the United States. The ground of removal set out in the petition is as follows: By the 113th section of an act of the Virginia Legislature of March 15, 1884, it is provided that that part of the general tax which is intended for the public free schools, shall be paid in money and not in coupons.†

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damus to compel any person authorized to receive or collect taxes, debts or demands due the Commonwealth, to receive coupons for taxes, it shall be the duty of such person to make return to said *mandamus*, that he is ready to receive said coupons in payment of such taxes, debts and demands, as soon as they have been legally ascertained to be genuine, and the coupons which by law are actually receivable. Upon such return the court before whom the application is made shall require the petitioner to pay his taxes to the tax-collector of his county or city or to the treasurer of the Commonwealth; and upon filing the receipt for such taxes in such court, the said court shall direct the petitioner to file his coupons in such court, which shall then forward the same to the County Court of the county or Hustings Court of the city where such taxes are payable, and direct said court to frame an issue between the petitioner as plaintiff, and the Commonwealth, as defendant, as to whether the coupons so tendered are genuine coupons, legally receivable for taxes. On the trial of the cause the attorney for the Commonwealth in the lower courts and the Attorney General in the Supreme Court of Appeals shall appear for the Commonwealth, and require proof of the genuineness and legality of the coupons in issue. Either party shall be entitled to exceptions, and an appeal to the Circuit Court and Supreme Court of Appeals, on the trial of this issue. If the decision be finally in favor of the petitioner, the *mandamus* shall issue requiring the coupons to be received for said taxes, and so forth, and they shall be so received; and on the certificate of such judgment, the Treasurer of the Commonwealth shall forthwith refund to the tax-payer the amount of currency or money before then paid by him for taxes, out of the first money in the treasury, in preference to all other claims.

5. This act shall be in force from its passage.

†SEC. 113. All taxes assessed on property, real or personal, by this act, and by it dedicated to the maintenance of the public free schools of the State, shall be paid and collected only in lawful money of the United States, and shall be paid into the treasury to the credit of the Free School Fund, and shall be used for no other purpose whatsoever. And to this end the Auditor of Public Accounts shall have the books of the Commissioners of the Revenue prepared, with reference to the separate assessment and collection of said school tax, and the several Treasurers of the Commonwealth shall have the tax-bills in their counties or corporations so made out as to specify the amount of tax due from each tax-payer to the said Public Free School Fund, including the capitation tax and school taxes of whatever kind or nature; and to keep said capitation tax and school taxes separate and distinct from all other taxes or revenues so collected by him, and forward the same, thus separate and distinct, to the Auditor of Public Accounts, which shall be kept separate and distinct by him from all other taxes or revenues until paid to the public free schools.

Section 2 of the same act provides that one-fourth of the whole tax shall be applied to the support of the public free schools.

The petitioner claimed the right to pay his entire tax, school and other, in coupons, and he claimed that this act, forbidding the school tax to be paid in coupons, impaired the obligation of his contract. This being so, he claimed that it was necessary to pass upon the constitutionalty of this act in the trial of the case, and that the case, therefore, arose under the Constitution of the United States. The case having been removed, and coming on to be heard, the Circuit Court of the United States held that it was not a case that could be removed, and remanded it to the County Court of Henrico. From this order the petitioner appealed.

ARGUMENT.

The third section of the act of January 14, 1882, provides that if, upon the trial it should be decided that the coupons tendered are "genuine, legal coupons which are legally receivable for taxes, then the judgment of the court shall be certified to the treasurer, who, upon the receipt thereof, shall receive said coupons for taxes and shall refund the money before then paid for his taxes, by the tax-payer, out of the first money in the treasury, in preference to all other claims."

Now let it be observed, there is no discretion vested with the treasurer here. It is peremptorily made his duty to pay such judgment as the court enters, and to refund the money that the tax-payer has theretofore paid, whether that money was paid for school taxes or for other taxes. The treasurer has no discretion. He knows nothing but the judgment of the court. Is it not clear then that it was intended by the law to say that the court should see to it that the school tax should be protected from the coupons, and that if any part of the tax for which the coupons had been tendered was dedicated by the act to the schools, that the court should exclude the coupons tendered for that part from the consideration of the jury?

The learned judge of the Circuit Court who remanded the cause, announced as his reason that it was no part of the duty of the court trying the genuineness of the coupons to pass upon the validity of the statute; that it was the duty of the court to have the genuineness of *all* the coupons certified to it tried, and that if

any question was to be raised respecting the School Fund, that question would be raised by the Treasurer when the judgment was presented for payment, and that the constitutionality of the act would not arise until a *mandamus* was applied for to compel the Treasurer to pay the judgment as rendered.

This argument wholly ignores the fact that the act makes it the peremptory duty of the Treasurer to pay the judgment as the court renders it, and leaves the Treasurer no discretion whatever. It assumes that the Treasurer will do that which the law does not authorize him to do, and which it, by the plainest implication, forbids him to do.

It assumes further, that, on the trial of the issue of the genuineness of the coupons, the Commonwealth's Attorney is to sit mum, while he knows that coupons are being proven for school taxes, when the law says they shall not pay school taxes; and that the court is to allow the same vain thing to be done under its own eyes, although it knows that the law forbids the payment of school taxes with coupons. Even before the decision of the Supreme Court of Appeals of Virginia in the case of *Vashon* v. *Greenhow*, no court could allow this to be done. It could not allow coupons to be proven genuine which had been tendered for taxes appropriated to the schools, for its judgment to be certified to the Treasurer to be paid by him unless he defied the law by refusing to pay it.

Suppose that this petitioner had paid all that part of his tax not appropriated to the schools in money, and had tendered coupons for that part appropriated to the schools only. Could the County Court have allowed the trial of the genuineness of these coupons to go on before it? Would it not have been compelled to declare at the outset that the trial would be a vain thing, since it could not enter judgment on any verdict, as the petitioner was not allowed by the law to recover any money from the treasury that had been paid in on account of the school money? If the proposition announced by the learned judge can be maintained, it must go the length of requiring the County Court to go through the vain formula presented in the last hypothesis.

If this would have been the case before the recent decision of the Supreme Court of Appeals of Virginia in the case of *Vashon* v. *Greenhow*, how much more must it be so since that decision.

That case has been appealed to this court and is on its docket, and the record is printed. In that case the Supreme Court of Appeals of Virginia decided that the 113th section of the Act of March 15th, 1884, is constitutional, and that the school money cannot be paid with coupons. With the act and the decision of the highest court of the State, both forbidding payment of the school money in coupons, how can a court permit the coupons to be proven genuine in respect to that money, and certify its judgment that they are genuine to the treasurer?

There is another ground upon which the jurisdiction of the Circuit Court might have been maintained. The Act of January, 14th, provides that the issue to be tried is, whether the coupons tendered are "genuine, legal coupons, *legally receivable for taxes.*" The issue submits, then, to the jury for its decision a mixed question of law and fact. They are to say by their verdict whether the coupons are genuine, and *also* whether they are by law receivable for the taxes for which they were tendered. This makes the jury express judges of whether the coupons will pay the school money, and thus it is absolutely necessary that the jury shall pass upon the constitutionality of the act forbidding the school money to be paid in coupons, *under the instructions of the court.*

Admitting, however, for the moment, that this question of law, which is a part of the statutory issue, is not to be determined by a jury—it cannot be denied that it must at least be settled by the *judgment* of the court, whether upon the verdict of the jury or upon a motion in arrest of judgment, or otherwise.

It cannot be maintained that a "correct decision" of this case could be reached in the State court without an express or implied decision by that court as to the constitutionality of the act of March 15th, 1884. If judgment should go for the plaintiff for the whole amount of the coupons tendered by him, it would be, in effect at least, a decision that the act of March 15th was unconstitutional and void, even although no such question had been openly raised. If judgment should be for the defendant as to that part of the coupons tendered for school taxes, such judgment would affirm and maintain the constitutionality of the act in question; which, in any event, the State court not only may, but *must* decide before it can give its judgment.

This view of the case brings it clearly within the intent and

meaning of the statute of March 3rd, 1875, as shown by the decisions, and entitles us to the jurisdiction of the Federal Court.

See *Tennessee* v. *Davis*, 100 U. S. R. p. 258:

"A case arises under the Constitution of the United States not merely where a party comes into court to demand something conferred upon him by the Constitution, * * * but wherever its *correct* decision as to the right, privilege, claim, protection or defence of a party, *in whole or in part*, depends upon the construction of either."

Railroad Company v. *Mississippi*, 102 U. S. R. pp. 135 and 141:

"It is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but when *a* question, to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is within the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

Ames v. *Kansas*, 111 U. S. R. 462:

"The right * * * will be defeated by one construction of these acts and sustained by the opposite construction. When this is so, it has never been doubted that a case is presented which arises under the laws of the United States."

See also, *Cohens* v. *Virginia*, 6 Wheat. 375.

Osborne v. *Bank of U. S.*, 9 Wheat. 816.

Mayor v. *Cooper*, 6 Wall. 250.

Gold-washing and Water Co. v. *Keyes*, 96 U. S. 201.

We submit that the judgment of the United States Circuit Court should be reversed.

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117-612

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IN THE

SUPREME COURT OF THE UNITED STATES.

D. K. STEWART, } Plaintiff in Error,
vs.
STATE OF VIRGINIA, } Defendant in Error.

Brief for Defendant in Error.

ARGUMENT.

Does this case involve any question arising under the constitution and laws of the United States?

The plaintiff in error asserts that it does, because the validity of the 113th section of the act of the general assembly of Virginia, entitled "an act to provide for the assessment of taxes on persons, property," &c., approved March 15th, 1884, will necessarily be drawn in question upon the trial of the issue in said cause.

I respectfully submit that no such question is raised in the record, and that no such question can be made upon the trial of the issue joined.

This is a statutory proceeding instituted pursuant to, and authorized by, the act of the general assembly of Virginia, entitled "an act to prevent frauds upon the commonwealth and the holders of her securities in the collection and disbursement of revenues," approved January 14th, 1882, as amended by act approved March 12th, 1884. See Acts 1881-2, p. 10; Acts 1883-4, p. 505.

The preamble of this act recites that there are outstanding bonds that are in existence without authority of law, other bonds which have been stolen or forged, and that genuine coupons from genuine bonds after having been received in payment of taxes, have been fraudulently reissued and received more than once for taxes, and then the act prescribes the

manner in which the coupons when tendered for taxes shall be received and forwarded for identification and verification.

This must be construed to apply to such taxes as are payable in coupons.

By section 113 of the act recited above, the school tax is required to be paid in money, and coupons are not received for this tax, whether genuine or not.

The court must therefore presume (which is a fact) that these coupons were tendered and received for such taxes as the laws of Virginia authorize to be paid in coupons when identified and verified.

There can only be two questions raised upon the trial of the issue in this case, and they are questions of fact, pure and simple:

1st. Is the coupon a genuine coupon, or is it a counterfeit?

2d. If it is a genuine coupon, has it been once received in payment of taxes and fraudulently reissued?

If these issues are found for the petitioner, the finding is certified to the treasurer and the money is refunded.

The tax-payer cannot bring the validity of the act complained of in question in this way. The coupons have been received and forwarded by the officer, and the tax-payer has filed his petition to have them identified and verified.

He now seeks, by suggesting that the court and attorney for the commonwealth will raise and have decided an issue that does not and cannot lawfully arise in the case, to have the cause removed and tried by a different tribunal.

The court and commonwealth attorney, in the absence of proof to the contrary, are bound to presume that the collecting officer has performed his duty, and that the coupons he has received and forwarded were received for such taxes as may be discharged by law in such coupons when identified and verified.

The general assembly having forbidden the officer to receive coupons for the school tax, *whether verified or not*, it is idle to contend that the officer has received them for such taxes.

No one knows better than the astute counsel for the complainant in error how to raise the question he seeks to have decided in this case, and it has been done in the case of Vashon vs. Greenhow, now pending upon the docket of this court.

The learned circuit court, in remanding a similar case, said:

"The act provides that, when coupons are tendered in payment of taxes due the commonwealth, the revenue officer shall receive and give receipt

for them; shall make them up in a package, and indorse the initials of the tax-payer upon the package; and shall deliver the package to the judge of the county or corporation court of the county or corporation in which the taxes are payable. It then authorizes the tax-payer to file a petition in that court calling for a jury, and directs that a jury shall be impaneled to try the question whether 'the coupons are genuine, legal coupons which are legally receivable for taxes.' The petitioners allege that the state has passed laws subsequent to that under consideration, which forbid her revenue officers to receive coupons for taxes; some of them wholly, and some of them in part. They charge that these later laws violate the constitution of the United States by impairing the contract engraved on the face of all coupons, setting forth that they shall be receivable for all taxes and dues to the state. They allege that the question of the validity of these later laws must arise before the juries impaneled to try the issue whether the coupons are genuine and 'legally receivable' for taxes, which is a federal question; and they insist that the cases at bar were removable into this court because of the federal question involved, more than $500 of coupons having been tendered in each case.

"The argument for jurisdiction thus presented is cogent and plausible, and is worthy of careful consideration. The inquiries on which the decision must turn are, what was the meaning of the legislature in the act by which it submits certain issues to the jury in cases brought for the verification of coupons? and what question or questions did it intend that the jury should try?

"The act of January 14, 1882, on which all those cases are founded, recites that bonds of the commonwealth, purporting to have been issued under her funding acts of 1871 and 1879, are in existence without authority of law, which are spurious, stolen, or forged, bearing coupons similar to those receivable for taxes, which are, of course, likewise spurious, stolen, or forged. It recites, furthermore, that there are outstanding, genuine coupons from genuine bonds, which, after having been once received in payment of dues to the state, are fraudulently reissued, and offered more than once in such payments. It, therefore, for the purpose of preventing frauds upon the commonwealth in this matter, proceeds to provide a way for verifying the genuineness of all coupons offered for taxes, and testing whether genuine ones are tendered a second time in payment of taxes. The manner in which the act directs the trial of these questions has been already indicated.

"The evils at which the statute was aimed were—*First*, the use of

spurious coupons; and, *second*, the use more than once of genuine coupons—in payment of taxes. The act provides, in substance and intention, that the jury shall try—*First*, whether the coupons are 'genuine, legal coupons,' not spurious; and, *second*, whether, if genuine, they are 'legally receivable' for taxes in being now used for the first time. That was the whole and sole intention of the legislature in the matter of the verification of the coupons."

"It is in vain for counsel for the petitioner to insist that the state, in the trial of these jury issues, does, in point of fact, call upon them to pass upon the validity of those more recent laws of her legislature which forbid the receipt of coupons for taxes, either for verification or any purpose. It is for the judges of the courts trying these cases to instruct the juries that such questions are not within their cognizance. If these judges refuse so to instruct, then, appeal being allowed by the act of 1882 to the circuit court and supreme courts of the state, redress would lie in that direction, and be ultimately obtainable in the supreme court of the United States. The *route* to redress does not lie through this court by means of removal. We cannot assume, before a case is tried in a county or corporation court, that its judge will allow a question of constitutional law to be submitted as a question of fact to a jury. We cannot do such violence to all legal probabilities and to all judicial amenities as to assume that such a happening would be possible. If it be, then redress must be sought by appeal, not removal. These causes must all be remanded."

See Jones *vs.* The Commonwealth of Virginia, Federal Reporter, vol. XXV, No. 11.

None of the authorities cited by the complainant in his brief, support the proposition asserted here. I answer them by saying that no such *a* question is involved.

This case was properly remanded upon another ground. This is a suit against the state of Virginia, which she has authorized to be brought against her in her own courts.

She has not submitted herself to the jurisdiction of the federal courts. Such jurisdiction is expressly prohibited to them by the 11th amendment to the constitution of the United States. Antoni *vs.* Greenhow, 107 U. S. 769.

The judgment of the circuit court remanding the case was clearly right, and should be affirmed.

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For Defendant in Error.